

7000 merks, which was reputed to be a competent price for the full right of the lands. It being thereafter *alleged*, That the charger had past from the said decret, in so far as, since the date thereof, he had of new again submitted his right of these lands to the arbitrators, whereby he could never clothe himself with that sentence, nor return thereto; this allegiance was repelled, seeing nothing had followed upon the new submission, nor no sentence given thereon; for the LORDS found, that the submission being expired, and nothing done thereon, and the charger never expressly renouncing his former decret in the submission, he was not thereby prejudged in the said sentence, but the same stood in its own force, and so the decret was sustained, and found not *ultra vires*.

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Act. Stuart.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. I. p. 434. Durie, p. 716.

1687. July.

KERR of Littledean *against* LAW.

JOHN HAITLIE having granted a wadset of the lands of Dunsyre, which he held ward of Andrew Kerr of Littledean, to Sir Alexander Don, and Littledean having pursued a declarator of recognition against Janet Law, relict of Andrew Simson, who had comprised the lands from Haitlie; *alleged* for the defender, That the recognition was not inferred by the wadset, because it was an improper wadset, affected with a back-tack, and the back-tack duty was far within the half of the rents of the lands; and seeing the reason of the feudal law upon which recognition is inferred is, that by the alienation the vassal is not in a condition to perform the services he ought to the superior, which is understood to be when the greatest part of the feu is alienated and the rents thereof exhausted, so that it necessarily follows, that any alienation by which the greatest part of the rent is not exhausted, does not infer recognition; and as an infeftment of annualrent, albeit out of the hail ward tenement, will not infer recognition, if the annualrent do not exceed the rent of the half of the land, so neither an improper wadset, which upon the matter has but the effect of an infeftment of annualrent, seeing the back-tack restricts the right to the annualrents of the sum contained in the wadset; and in recognitions, the nature of the right as to transmissions of the fee of the lands is not so much considered as the effect of the right, if it exhaust the greatest part of the rent or not; and it is upon that ground that in liferent infeftments and infeftments of reliefs and warrandice, albeit of the whole ward tenement, yet as to the inferring recognition, the value of the liferent, and the hazard of the warrandice and relief is only considered; as was decided 7th July 1681, Hay against the Creditors of Muirie, (See No 62. p. 6470 :) And if a

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Found, that a superior, having purchased from his vassal, could not allege that recognition was thereby incurred.

No 40. ward vassal should grant a sub-feu, albeit of the property of the hail ward tenement, yet if by the *reddendo* there be a greater feu-duty payable to the ward vassal, recognition will not be inferred by such a sub-feu; and the pursuer did grant a bond obliging him to grant Haitlie a charter of the lands upon an apprising, and whereunto he had acquired right, and to grant him a precept of *clare constat*, upon which he might be infeft as heir to any of his predecessors that died last infeft, and to grant a charter of confirmation to several of Haitlie's creditors particularly mentioned in the bond, to whom Haitlie should grant wadsets of the land; and albeit this wadset was not granted to any of the creditors named in the bond, yet the money being borrowed from Sir Alexander Don for payment of one of these creditors, it was of the nature of *surrogatum*; and so the bond ought to be effectual as a confirmation of the wadset granted in favours of Sir Alexander Don, as if it had been granted to that creditor that was paid by Sir Alexander Don's money; and the pursuer has homologated the wadset, in so far as he had acquired right to the same from Sir Alexander Don, and by virtue thereof had possessed the ward lands. *Answered*, That Haitlie the vassal being denuded of the fee and property of the lands by the wadset, it did infer recognition; and the back-tack restricting the effect thereof to the annualrents of the sum contained in the wadset, did not alter the nature of the right, nor state any part of the fee and property in the vassal's person, no more than if a ward vassal dispone his lands and should take a tack from the person to whom he disposes the same, for payment of a tack-duty within the half to the value of the lands, yet notwithstanding, such a disposition will infer recognition, but more especially in this case, where the back-tack did bear a clause irritant, which is declared, and the wadsetter came in possession of the lands; and there is a great difference between an infeftment of annualrent or an infeftment of warrandice and a wadset; because, by an infeftment of annualrent, there is no more conveyed of the property of the lands, but only so much of the rents as is equivalent to the rent of the sum, which, if it be within the half of the rent of the lands, does not infer recognition; and an infeftment of warrandice or relief is not to take present effect, but only in a certain event, in case of eviction of the principal lands or distress, and the event being dubious, the case may never exist, and so does not infer recognition: And it may be urged upon very good grounds, that a sub-feu will infer recognition, albeit the *reddendo* of the charter be of a greater rental than the half of the rent of the lands; but albeit such a sub-feu should not infer recognition, yet the parallel does not hold, because a wadset differs from a sub-feu bearing a *reddendo* of a greater value than the rent of the half of the lands, because a wadset, albeit affected with a back-tack, yet is a total alienation of the fee and property of the lands; whereas, when there is a sub-feu granted by the ward vassal, bearing a *reddendo* of a greater duty than the half of the rent of the lands, so that the half of the rent

is not exhausted, it is not a total alienation of the lands, but only of a part, the property being retained effecting to the duty contained in the *reddendo* of the charter; and the bond granted by the pursuer, whereby he is obliged to enter Haitlie the vassal upon the apprising, and by a precept of *clare constat*, cannot prejudice him of the benefit of recognition or other casualty of superiority; for if the vassal had been actually infeft, the recognition would have still been incurred by alienation of the major part of the lands, and the obligation to confirm wadsets to be granted by the vassal to the creditors particularly named, cannot be extended in favours of others, it being a principle in the feudal law, that *extensio non fit de persona in personam ubi agitur de consensu Domini*: And albeit it could be instructed that the money borrowed upon that wadset had been employed for payment of the debt due to one of the creditors contained in the bond, yet that cannot oblige the pursuer to confirm this wadset in favour of Sir Alexander Don, who was not named, seeing all such obligations are *stricti juris*, and are not to be extended; and a vassal cannot imprise another vassal to the superior in his place, by any voluntary deed of the vassal without the superior's consent; as also the debt paid to the creditor was extinguished by payment, so that the sum contained in the wadset borrowed from Sir Alexander Don could not be *surrogatum*; and the pursuer acquiring right to the wadset from Sir Alexander Don is not such an homologation as is equivalent to a consent or confirmation of the right, because it must be some express and direct deed ratifying and confirming the right that can have that effect, which cannot be inferred by taking a disposition to the wadset, it being free for the pursuer to make use of that right or not; and albeit he had possessed the land by virtue of the wadset, yet that does not hinder him to make use of his right of superiority and pursue the recognition, no more than if a man should have a right to lands, and should acquire another supervenient right, he may make use of any right he pleases, the one without prejudice of the other. THE LORDS repelled the foresaid defence, founded upon the back-tack set by the wadsetter to the vassal, the reverser; and found recognition inferred by the wadset being the major part of the feu; and also, repelled the foresaid defence founded upon the superior's obligation, the same being only personal to confirm Mr Strang's wadset, but not the wadset to Sir Alexander Don; but sustained the defence of homologation, and found the same proved by homologation of taking a disposition of the land from the wadsetter, though blank in the bearer's name; and that by producing of the same, and debating thereon in this process; and therefore assolized the defender.

Fol. Dic. v. 1. p. 431. Sir P. Home, MS. v. 2. No 928.

* * * Harcarse reports the same case:

1687. June.—In a superior's declarator of recognition of lands wadset with a backtack for a sum under the half of the value.

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Alleged for the defender; That till the back-tack be declared (void), and brought to the case of a proper wadset, the back-tack duty only, which is below the half of the rent, is to be considered as the burden. And as infestment of warrandice out of a whole tenement is not to be considered an alienation of the whole or major part, unless the distress exceed the half of the value, till which time it is no title of possession, so neither is an improper wadset with a back-tack to be considered before declarator as a ground of recognition, unless the back-tack duties exceed the half of the rent. And the like may be said of an infestment in security out of a whole tenement for a sum under the half of the value. 2. The pursuer was obliged to confirm wadsets granted by the vassal. 3. He acquired the wadset right by which recognition is alleged to be inferred, and so hath approved the wadset, and passed from any recognition incurred.

Answered; Though the back-tack duties be less than the half of the profits of the lands, recognition must be incurred, the fee of the whole land being disposed, for it is the vassal's contempt thereby, and not the value of the back-tack duties, that is to be the rule of recognition. 2. The superior's obligation to confirm was conceived in favours of particular persons therein mentioned, viz. one Strang, &c. and the wadset quarrelled was granted to Sir Alexander Don, one more powerful than the superior, whom the vassal could not obtrude to him. 3. Sir Alexander's right was acquired after recognition was incurred, and so that acquisition cannot prejudice the prior recognition. But then the right is yet blank; and the wadset containing both feu and ward lands, the pursuer designed only to affect the feu, and to leave the ward under recognition.

Replied; The superior being obliged to confirm the wadset to Strang, had no prejudice by confirming it in favours of Sir Alexander Don; for though, by the feudal law, when the personal service was due, it might be inconvenient for a superior to have a vassal more powerful than himself; now the greater a ward-vassal is, the superior has the greater profit by his marriage. 2. Any consent or approbation by the superior, viz. accepting resignation or feu-duties for subsequent years, as Craig observes, even after the casualty is fallen, will secure lands so approved; consequently the acquiring the right from the vassal must have the same effect.

THE LORDS repelled the defence on the back-tack duties, and also repelled the second defence upon the obligation to confirm, Sir Alexander Don being none of the persons named; but they sustained the third defence of the superior's homologation, by purchasing the right of the wadset wherein the wardland was contained, and found the same to be the pursuer's evident, though blank, he producing the same and paying the money. See RECOGNITION.

Harcarse (RECOGNITION), No 828. p. 235.